SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968.

No. 1235

REESE HUBBARD AND LAS VEGAS HACIENDA, INC.,
Petitioners,

vs.

DONNA M. KIEFEL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Three separate appeals were taken in this case: No. 15933, which is an appeal by the defendant, Las Vegas Hacienda, Inc., from the order of Judge Robson granting a new trial; No. 15976, which is an appeal by the respondent Reese Hubbard, attorney for the Las Vegas Hacienda, Inc., from the order assessing costs and attorneys' fees against him. These two appeals were consolidated by order of the United States Court of Appeals for the Seventh Circuit on December 29, 1966. Also filed was a separate appeal by the Las Vegas Hacienda, Inc., No. 16210, which is an appeal from the $100,000 plaintiff's judgment on the verdict in the second trial of this case. This appeal was never consolidated with the other two contrary to

representation in the Petition for Writ of Certiorari filed here by the petitioners (Pet. p. 1).

All extraordinary costs and attorneys' fees, which are at issue in the pending petition are against Reese Hubbard, attorney for the Las Vegas Hacienda, Inc., personally, and not against the Las Vegas Hacienda. Thus, the petition as to costs and attorneys' fees concerns only Attorney Reese Hubbard and the prayer to review the personal injury award concerns only Las Vegas Hacienda.

QUESTIONS PRESENTED.

A. (As to the Defendant, Las Vegas Hacienda, Inc.)

1. Should this court grant certiorari and review a personal injury judgment, no assessment of costs or attorneys' fees being involved, based upon alleged errors in lower court rulings on evidentiary matters of such insignificance that they were not even commented upon by the Court of Appeals?

2. Should this court grant certiorari and review findings of fact by two District Court judges and the Court of Appeals finding that defendant's trial lawyer, Reese Hubbard, engaged in outrageous, unethical, and unprofessional trial tactics in two trials of this case? Is not the impact of this misconduct clearly shown by the difference in the two verdicts in the two trials of this case; i.e., the not guilty verdict in favor of the defendant in the first trial and the $100,000 verdict in favor of the plaintiff in the second trial?

3. Should this court grant certiorari and review an order granting plaintiff a new trial based upon misconduct of counsel when such new trial order was the result of the trial court's personal observation of such misconduct, particularly when such new trial order was affirmed by the Court of Appeals?

B. (As to Respondent, Attorney Reese Hubbard.)

1. Does not a court have inherent, statutory and court rule power to award attorneys' fees and/or costs where the defense has been "maintained in bad faith, vexatiously, wantonly or for oppressive reasons"?

2. Can a trial lawyer of years of experience repeatedly make false statements to the court; attempt to improperly influence a jury by the introduction of statements not in evidence under the pretext of laying a foundation for impeachment but never carrying through; examine witnesses on an exhibit never offered in evidence; repeatedly make known meritless objections both in trial and pre-trial phases of the case for the purpose of harassment; delay and prolong the proceedings by falsely denying agreements previously made for depositions; secrete a deposition in his office and prevent its filing; allege inflammatory material in his opening statement and then never offer any proof of the same; cause the necessity of two trials of a personal injury case by his actions, and then claim that he should not be liable for excessive costs?

3. Can the respondent Hubbard reasonably argue that his conduct is unintentional or accidental when in the second trial of this case he again engaged in shocking trial practices such as attempting to slip an excluded exhibit into the jury room when such exhibit was on numerous occasions ruled inadmissible by the court; repeatedly misquote portions of depositions to the jury leaving out material unfavorable to his client; misquote the transcript of the first trial record on cross-examination of a witness; filing an untimely abortive notice of appeal six months after the new trial order requiring plaintiff's counsel to file a short record on appeal with the Court of Appeals and to obtain by motion and briefs the dismissal of the abortive appeal; to be found guilty of misconduct in numerous other cases in the Illinois Appellate and Supreme Courts and the Court of Appeals and then claim that the new trial was granted in this case "simply because it (the court) dislikes either the verdict or the lawyer" (Pet. p. 5)?

4. Does the phrase "Independence of the Profession"

offer a convenient word shield to those who seek to misuse the license of this honorable profession?

5. Is a lawyer entitled to a jury trial before the court may assess costs for his misconduct occurring in the presence of the court and imposed after notice, motion, hearing and briefs and not under civil or criminal contempt?

6. Is not the award of costs a proper method available to an aggrieved plaintiff to be made whole who has been put to additional costs and expenses by a defense lawyer engaged in blatant misconduct for the purpose of economically pulverizing the opposition by costly tactics?

STATUTES AND RULES INVOLVED.

The following statutory and rule provisions, reprinted in Appendix A, involved are: 28 U. S. C. sec. 2111 (Harmless Error); Illinois Revised Statutes, Chap. 110, Sec. 41 (Untrue Statements); Federal Rules of Appellate Procedure, Rule 38 (Damages for Delay); Federal Rules of Civil Procedure, Rule 37(a) (Refusal to Make Discovery: Consequence); Rule 52(a) (Findings by the Court); Rule 56(a) (Summary Judgment: Affidavits Made in Bad Faith).

STATEMENT OF THE CASE.

The Petitioners' Statement of the Case is so inaccurate and argumentative that we are compelled to submit a review of the facts in the case.

This case is a negligence action against the defendant hotel for failing to protect the plaintiff, a paying guest, from an assault by a stranger. Plaintiff established liability against the defendant on the theory of *Danile* v. *Oak Park Arms Hotel,* 55 Ill. App. 2d 2 (1964) and *Fortney* v. *Hotel Roncroft, Inc.,* 5 Ill. App. 2d 327 (1955). These cases held that a hotel should exercise a high degree of care to prevent an assault on a paying guest.

Plaintiff and her husband of Chicago were induced by advertising to go to Las Vegas and stay at the defendant hotel as a result of defendant's promotion of the so-called Hacienda Champagne Flight (Addl. A. 5).* Among other things they were to receive for the sum of $188 each, several bottles of champagne, three shows, a de-luxe room, and a flight from Chicago to Las Vegas on the Hacienda's airplane and back (A. I-99). After arriving in Las Vegas and being assigned to Room 315 at the defendant's hotel plaintiff and her husband went to various shows, gambled some, and on the day of this occurrence, took a trip to Hoover Dam and Lake Meade, returning to the hotel in the late afternoon hours (A. I-202). That evening plaintiff and her husband went to several shows, returning to the Hacienda in the morning hours, some time after midnight.

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* References to the appendices in this brief are as follows:
(A. 25)—(Appendix to Petition for Writ of Cert.).
(A. I-101)—1st Trial Appendix—#15933 and #15976.
(A. II-101)—2nd Trial Appendix #16210.
(Addl. A. 101)—Plaintiff's Additional Appendix.

Plaintiff then became tired and returned to her room leaving her husband in the hotel gambling casino with other persons on the tour (A. I-156-57).

On her return to the room she entered the alcove door which opens on the corridor, proceeded into the inner vestibule and used her key to open the door to Room 315. The adjoining room inside the alcove vestibule was occupied by strangers. She then closed the door and it was locked (A. II-285). In this regard the defendant's head of security, Orville Prolle, testified that the door automatically locked when it was closed (A. II-300).

In the first trial of this case the plaintiff's husband testified that he returned to his room at approximately 6:30 A.M. on the morning of the occurrence and was unable to awaken his wife through knocking on the door. He then obtained a maid with a passkey who opened the door and allowed him to enter Room 315 (A. I-223). He found his wife severely beaten, almost dead, with her torn and ripped nightgown on the bed. There was blood all over the room (A. I-223).

Plaintiff suffered serious, almost fatal injuries. She received a depressed skull fracture with permanent damage to the 5th, 6th and 7th cranial nerves. One side of her face including her eye is permanently paralyzed (A. II-406 and 429). She will never be able to move her eye normally again. She has no feeling if something gets in her eye (A. II-436-37). She has a permanent ear perforation (A. II-420). Her brain has been permanently damaged in the left hemisphere, in the temporal lobe area (A. II-188-89).

The Clark County Sheriff's police were on the scene in the morning of March 1st and their investigation revealed that the door to the plaintiff's room (315) had recently been jimmied or shimmed (Plts. Ex. 58 (A. II-818-823)).

The police took photographs of the door jamb and lock showing the shim marks and removed the lock mechanism, catch plate and plunger (A. II-103). These items were introduced into evidence in both trials of this case. Through the testimony of the architect who designed the defendant hotel it was established further that the outer door, or vestibule door, to Room 315 did not have a lock as was called for in the design. Other similar parts of the hotel had such a lock but not this vestibule door. Both plaintiff and defendant's lock experts agreed that the lock that was on Room 315 was defective (A. II-472-74).

The police investigation further revealed that $150 in travelers checks had been taken from the plaintiff's purse and had been forged at the Tropicana Hotel between 4:30 and 5:00 A.M. on the morning of this occurrence. Witnesses described the person who had cashed these checks (A. II-825, Plt. Ex. 82) and the person described was considered a prime suspect although never apprehended. Mrs. Kiefel, the plaintiff, testified that the assailant was a stranger to her (A. I-191).

Plaintiff was in the hospital unconscious for several days. Defendant relied heavily in the trial of the case on incoherent statements made by Mrs. Kiefel while a patient at the hospital immediately after her injury. Yet, the doctor who treated her said she was always "stuporous and semi-comatose" while at the hospital (A. I-461). In addition, the police woman who took one of the statements testified that plaintiff was not coherent while she was interviewed (A. II-644-645). Plaintiff's roommate while in the hospital also testified concerning her confused incoherent state of mind (A. II-383). This was a jury question resolved in favor of the plaintiff.

In the first trial of this case the Hacienda's attorney, Reese Hubbard, through the use of insinuation and in-

nuendo, in his opening statement and in cross-examination of witnesses, suggested that it was the plaintiff's husband who had committed this assault. The charge was made by innuendo (A. I-80-81). For Mr. Hubbard to have made such a charge in his opening statement would have opened the door to a complete rebuttal on the part of the husband. He was cleared by the police who confirmed his whereabouts that night, with other tour members and the evidence clearly showed that the assailant was an unknown person who had cashed the stolen travelers' checks. This was one of many acts of counsel's misconduct, which resulted in the granting of a new trial for plaintiff.

Interestingly enough, in the second trial of this case after the new trial had been granted based on Mr. Hubbard's misconduct, counsel for the plaintiff made a request that he not use such tactics in the second trial opening statement (A. II-82, 84-85). Mr. Hubbard denied that he ever accused the husband in the first trial and agreed he would not in the second trial (A. II-82-85).

The first trial resulted in a verdict for the defendant. Plaintiff filed a motion for new trial alleging numerous acts of misconduct by Defense Counsel Hubbard.

The defendant here takes the position that the new trial was granted solely on the three itemized items on objectionable trial strategy of respondent Hubbard. Although they were factors of consideration, others were considered also but are not mentioned in the petition filed here (Pet. pp. 9-15). Judge Robson's opinion granting the new trial clearly states (A. 11) "that the other misconduct alleged in the motion for new trial viewed cumulatively, in conjunction with the aforesaid acts, are more than sufficient to make the court conclude that the plaintiff was not accorded a fair chance to present the facts of her case to the jury." The court also stated that it granted the motion for new

trial (A. 11) "solely from its own observation of defense counsel's tactics."

The misconduct of Respondent Hubbard in the first trial of this case may be summarized as follows:

1. Misconduct in failing to file the deposition of witness Sharon Hamlin by misappropriating the deposition from the custody of the court reporter and by interfering with the reporter in the performance of her duty and obligation to file the deposition.

2. Falsely stating to Judge Robson that he did not have the original deposition of witness Sharon Hamlin nor did he know its whereabouts (A. I-514), then having this falsehood exposed by his own witness (A. I-537), again misstating that he had sent the transcript back to the court reporter (A. I-542). The court reporter testified she didn't receive it until some four months later, after the new trial was granted (A. II-781-82). Petitioner still denies this in its Petition filed here (Pet. p. 13).

The deposition was withheld by Mr. Hubbard because it contained the witness' inked-in changes of her answers under oath (A. II-30-67)—all unknown to plaintiff's counsel. Each of these changes favored the defendant (A. I-33-67). Defendant then urged that a copy of the deposition (without changes) be used rather than the withheld changed original. Notwithstanding the fact that Mr. Hubbard had the changed deposition in his office ("It was given to me, Your Honor.") (A. I-541), he still suggested to the Court in inquiry as to the accuracy of the deposition copy, "I am unable to say what corrections she made or whether she made any or not" (A. I-604). Hubbard improperly withheld the tools of impeachment.

THE IMPORTANCE OF THIS MISCONDUCT IS BETTER UNDERSTOOD WHEN IT IS RELATED TO IMPEACHING TESTIMONY SOUGHT TO BE SUPPRESSED AND IMPROPERLY WITHHELD. PETITIONERS' CHARGE II—SHARON HAMLIN.

Petitioners incorrectly describe witness Sharon Hamlin as a "*student* nurse" (Pet., p. 13). She was years removed from the "student" age.

Miss Hamlin also had indicated her prejudice against the plaintiff in a pre-trial statement. She had said that she loved Las Vegas, and "you could have a very bad effect on Las Vegas if this case gets out in the paper." Also, "there is nothing wrong with the Hacienda and there is nothing wrong with Las Vegas and I want to prove it because I like it here" (A. II-71).

Showing her feelings about plaintiffs she said, "I don't believe in suing people at the drop of a hat and being a nurse I am disgusted with it. I am and I think that is perfectly disgusting and that is what she is doing" (A. II-70).

Judge Decker found that this witness "without question" committed perjury in the second trial (Addl. A. 207). He also commented on the numerous changes which she made to her deposition, which deposition was not available for use at the first trial.

Judge Robson described her testimony as containing "manifest inconsistencies" and he also found evidence of her "hostility to personal injury suits" (A. 15-16).

3. Misconduct in making prejudicial cross-examination and opening statement on matters not in evidence of a highly prejudicial nature suggesting a husband and wife argument on the night of this occurrence and never offering proof in connection with the opening statement or the cross-examination (A. I-31).

THIS MISCONDUCT IS BEST UNDERSTOOD BY RELATION TO PETITIONERS' CHARGE I — HUBBARD'S OPENING STATEMENT AND HIS FAILURE TO PRODUCE TESTIMONY.

In Hubbard's opening statement he firmly planted a seed in the jury's mind about a husband and wife fight on the night of this occurrence (A. I-80-81, 82-83), then in his cross-examination of Donna Kiefel he stated that Donna knew who her attacker was (A. I-191 and 193); that she called out "Carl" when the attacker entered the room; and that she made no outcry (A. I-193).

Defendant never at any time offered any evidence that the husband had a fight with his wife (the plaintiff) that night, or that the husband had telephoned one of the hotel operators repeatedly about being locked out of his room because of such a fight. He did, however, cross-examine the husband about such a fight and received a denial (A. I-277). These questions were permitted under the guise of later impeachment which never appeared or was offered.

Finally, in the second trial, when defendant attempted to offer the testimony of the telephone operator Dixie Tracy, it was discovered that he couldn't even lay a proper foundation for its admissibility (Addl. A. 208, A. II-610).

4. Misconduct in exhibiting a large door replica allegedly of Room 315 of the defendant hotel, examining witnesses on it and then never attempting to introduce it into evidence (A. I-31, Addl. A. 31-33, 37).

5. Misconduct through their Las Vegas attorney-agent in failing to release a court reporter to come to Chicago to testify after a deposition was not filed (Addl. A. 136-37; A. I-26-29).

THIS MISCONDUCT IS RELEVANT TO THE UNAVAILABLE SHARON HAMLIN IMPEACHING DEPOSITION AND IS IMPORTANT TO UNDERSTANDING OF PETITIONERS' CHARGE III — THE UNAVAILABILITY OF THE COURT REPORTER BUTTERFIELD.

Page 15 of Petitioners' Brief states that reporter Butterfield never talked to Attorney Jacobson personally nor ever purchased a ticket to come to Chicago to testify. Yet the record shows the witness answered that she "had several conversations with him," and also that upon being contacted she did "call and made a reservation with an airline" (A. I-664-665). She also said "I got through to Mr. Jacobson" about 7:30 or 8:00 in the evening (A. I-664-665).

In addition, the attorney (Mr. Singleton) who prevented her from coming to testify was clearly connected with the defense of this case. At a deposition held in Singleton's office, Attorney Frank Hall, Mr. Hubbard's law partner, told a witness (A. I-28-29) that if he located certain items of evidence he should "notify Mr. Singleton here, who is a local lawyer. * * * and then maybe we can make some other arrangement." Mr. Singleton was also the local (Las Vegas) attorney for the defendant's insurance carrier. The entire sequence of events justify Judge Robson's opinion in the new trial order on this issue:

A. The failure of Hubbard to file the Hamlin original deposition although repeatedly requested to do so.

B. Hubbard's assurances to the court that he knew nothing of the deposition which was later shown to be a complete falsehood.

C. The admission from the witness that she personally delivered the deposition to Mr. Hubbard's office.

D. The initial agreement of the reporter to come to

testify and her later inability due to Mr. Singleton's refusal.

E. Mr. Singleton's connection with the defendant in this case. Under all of the harassment and lack of cooperation received from defense counsel in this case, how can he honestly suggest we should have asked him to intervene with Singleton.

6. Misconduct in steadfastly objecting to introduction into evidence of the deposition witness, Lt. William Witte, taken in Las Vegas on the grounds that there was no agreement to take this deposition (A. I-47-49) thus causing a half day hearing on this harassment tactic before Judge Robson (Addl. A. 42-69). The trial court considered this matter a very serious one and had all the attorneys testify concerning the alleged disagreement concerning the deposition. Thereupon, it became obvious that there was in fact an agreement to take the deposition and the court permitted the deposition to be read. The entire proceeding, however, took up much of the court's time and delayed the orderly process of the trial (Addl. A. 53-54).

7. Refusal to cooperate in the pre-trial phase as to the admissibility of exhibits as a harassment tactic since the same exhibits were admitted at the trial without objection or on no valid grounds for objection (A. I-51-53).

Judge Robson repeatedly warned defendant's counsel concerning their meritless objections and the obstructionist program during the pre-trial stages and he further warned that he would tax costs at trial if he found these objections to be improper (Addl. A. 21-22; Addl. A. 45; Addl. A. 26-27; A. I-148).

8. Defense counsel in the pre-trial stages constantly relied on technical meritless objections to the admissibility of the lock assembly and catch plate thus requiring counsel to take further police depositions in Las Vegas (A. I-53-

54). Pltf. Ex. 52A and 52B were admitted in the first and second trials without objection (Addl. A. 77-78; A. II-126). Defense Counsel Hubbard objected during trial to police photos taken at the scene of the crime and listed in the pre-trial order as Exhibits in which defendant's attorney, Frank Hall, stipulated and had no objection. This type of conduct took up a good deal of the Court's time. (Plts. Ex. 1-6, A. I-358, 367). For the defense trial objection see Addl. A. 35-37.

9. Defense counsel objected to the certain paid medical bills incurred by the plaintiff, copies of which were given to defense counsel long before trial and were part of the pre-trial order (A. I-54). The paid medical bills were admitted into evidence at the first trial and in the second trial but only after serving requests to admit (Addl. A. 153).

As Judge Kerner said in his opinion (A. 28): "Not satisfied with the lesson he should have learned from the outcome of the first trial and the judgment of costs against him, Hubbard continued his misconduct at the second trial."

This included:

1. Attempting to slip an exhibit into the jury room which had been denied admission into evidence on repeated occasions (Addl. A. 205-206).

2. Filing some 6 months later an abortive appeal from the new trial order in the last minute before second trial was to begin (Addl. A. 171), harassing plaintiff's attorneys by causing them to file a short record with the Court of Appeals with motions and briefs to obtain the dismissal of the frivolous appeal.

3. Intentionally misreading a deposition to the jury leaving out the word "Doctor," in reading the previous testimony of Dr. Ward C. Halsted, Ph.D., Professor at

the University of Chicago Medical School and Director of Medical Psychology at Billings Hospital (A. II-195-197).

4. Cross-examining the plaintiff as to answers that were stricken from the record in the first trial, then commenting on the stricken material in his final argument to the jury (A. II-736-737).

5. Intentionally misreading answers of witnesses to the jury from the depositions and testimony at the first trial (Addl. A. 202).

ARGUMENT.

REASONS FOR NOT GRANTING THE WRIT

(AS TO THE DEFENDANT LAS VEGAS HACIENDA, INC.)

Petitioners have failed to show any issue as to the defendant Las Vegas Hacienda, Inc., which should merit a grant of certiorari and delay the collection of the $100,000 plaintiff's judgment. Petitioners seek to have the tail wag the dog in raising matters relating to the assessment of costs and attorneys' fees against Reese Hubbard personally ($1741.20 costs plus ⅓ appeal attorney fees), and attempts to have these unrelated issues assist them in their efforts to delay the collection of this judgment.

There is absolutely no showing in the petition that the case against the Las Vegas Hacienda, Inc. involves either (a) a conflict in decisions in the courts of appeal, or (b) any question of importance which, in the public interest, should be decided by this court of last resort.

The Las Vegas Hacienda, Inc., is asking this court to grant certiorari to review findings of fact by two district court trial judges, which findings were affirmed by the Court of Appeals. In addition, they seek to have certain evidentiary rulings reviewed by this court.

The arguments of the Hacienda for granting the writ fall into three categories:

1. That somehow the Hacienda was prejudiced because the courts below had reviewed other cases where their attorney, Mr. Hubbard, had been found guilty of professional misconduct.

The cases cited in the petition refer to criminal charges wherein prior criminal acts are shown to indicate guilt in

a criminal case. These bear no relevance to the present case where the court below merely reviewed the other cases involving Mr. Hubbard to show that his conduct is not inadvertent or unintentional. As a matter of fact, the Illinois law on misconduct of trial counsel has been established by the repeated abuses of the judicial process by Mr. Hubbard. The opinion below accurately reviews the numerous instances wherein Mr. Hubbard has been criticized for his trial misconduct. The misconduct falls into the same categories as are found in the instant case (A-28). As Judge Robson points out in his new trial opinion, the new trial was granted "*solely from its own observation of defense counsel's tactics,* irrespective of the citation of similar action by the Illinois courts occasioned by the same counsel's conduct in the same regard." He held that these other acts did, however, "furnish corroboration that his acts were not mere happenstance, inadvertently and unintentionally occurring." (A. 11-12.) Even if no other cases had been involved, the acts in this case were sufficient to prejudice the plaintiff.

Although counsel for defendant now asserts that review of his conduct in other cases is prejudicial, we note that he filed lengthy pleadings in response to our motion for costs in which he supplied 13 affidavits of judges concerning his proper conduct in other cases (A. I-125-137).

2. That the new trial should not have been granted because there was no "objectionable trial strategy" and that it was granted because the court below didn't like the "verdict or the successful attorney."

This court has held on repeated occasions that new trial orders are discretionary with the trial court and will not be reviewed except for extraordinary circumstances. *U. S.* v. *Johnson,* 327 U. S. 106, 111; 90 L. Ed. 563, 565 (1946); *Texas & Pac. Ry. Co.* v. *Harvey,* 228 U. S. 319; 33 S. Ct.

518; 57 L. Ed. 852 (1913), particularly when the new trial order was affirmed by the Circuit Court of Appeals. The misconduct was so clearly established in this case that the trial court saw fit to tax costs against Hubbard personally. This action certainly indicates the attitude of the courts below as to the nature and extent of the misconduct of Hubbard and its effect on the outcome of the trials. We submit that the validity of Judge Robson's new trial order is conclusively shown when the different results of the two trials are considered: a not guilty verdict in the first trial and a $100,000 verdict for the plaintiff in the second trial. The findings of fact as to the misconduct of Reese Hubbard should not be reviewed here. The rule was correctly stated by Justice Jackson in *Graver Tank and Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U. S. 271, 275; 93 L. Ed. 672 (1949):

> "A court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

3. That the hearsay consisting of alleged conversations between plaintiff's husband (not a party to the case) and a maid and telephone operator, employees of defendant, not in the presence of the plaintiff, should have been admitted as evidence.

The evidentiary rulings in this case have now been identical in two trials and affirmed without comment in the Circuit Court of Appeals. This court has repeatedly stated that it will not review evidence or inferences drawn from evidence. *Appalachian Power Co.* v. *Amer. Inst. of Certified Public Accountants*, 80 S. Ct. 16, 4 L. Ed. 2d 30 (1959); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175; 50 S. Ct. 849; 82 L. Ed. 1273 (1938); *Houston*

Oil Co. v. *Goodrich,* 245 U. S. 440, 38 S. Ct. 140; 62 L. Ed. 385 (1918).

In addition, a review of the rulings of the courts below would be a review of rulings which excluded evidence and would be contrary to this court's decisions in *Lavender* v. *Kurn,* 327 U. S. 645; 66 S. Ct. 740; 90 L. Ed. 916 (1946); *National Labor Relations Board* v. *Donnelly Garment Co.,* 330 U. S. 219; 67 S. Ct. 758; 91 L. Ed. 854 (1946); *Michelson* v. *U. S.,* 335 U. S. 469; 69 S. Ct. 213 (1948).

In addition to the foregoing, under the statute and the rules the Court of Appeals and this court do not review evidentiary matters where substantial justice has been done. Title 28, U. S. C., Sec. 2111; F. R. C. P. Rule 61.

In view of the numerous occasions that petitioners make reference to this hearsay evidence we feel compelled to review the record in connection with these matters. It should be noted that the offered testimony of alleged conversations between the plaintiff's husband (not a party to this suit) and the employees of defendant hotel were outside the presence of the plaintiff.

A. *Dixie Tracy*—The defendant's telephone operator was supposed to have had a conversation with Carl Kiefel consisting of an alleged 14 telephone calls to his room between 2:00 A. M. and 6:15 A. M. on the morning of this occurrence. He was supposed to have said that his wife and he had had words and that she put the chain on and he couldn't get in the door.

At the first trial before Judge Robson defendant did not even make an offer of proof as to this testimony, an absolute violation of the good faith in impeachment rule. Cleary, *Handbook of Illinois Evidence,* 2d Ed., Sec. 9.11, p. 144, *Neusus* v. *Sponholtz,* 369 F. 2d 259, 260-261 (7th Cir. 1966).

At the second trial it was discovered that defendant

could not lay a proper foundation for the admissibility of such testimony (Addl. A-208; A. II-610) and it was excluded on that further basis (A. II-610; Addl. A. 208). This purported telephone conversation of a person constantly in the employ of the defendant was never reported to the police (Addl. A. 157-158) and also directly conflicts with the other hearsay testimony that the defendant attempted to introduce, that of the maid, Willie Lee Carpenter. Plaintiff's husband was alleged to have told Willie Lee Carpenter that his wife was to leave the door open for him (A. II-604); an entirely inconsistent and different story from the husband and wife argument offered by Mr. Hubbard's other witness.

In describing the incident both of these hearsay witnesses also contradicted themselves on what Mr. Kiefel was supposed to have been wearing on the night of the occurrance. Carpenter stated he was wearing a suit with matching pants (A. II-606) whereas, Tracy stated that the caller had on a gold alpaca sweater and beige slacks (Addl. A-221).

2. *Willie Lee Carpenter*—Mr. Kiefel's alleged statement to the maid, Willie Lee Carpenter, was offered at both trials and excluded as hearsay evidence by both district court judges. It is interesting that the maid was interviewed by two police officers on the morning of this occurrence and their reports were admitted in evidence in this case (A. I-688; A. II-820). She mentioned nothing to either of the officers about an alleged statement by Mr. Kiefel that his wife was to leave the door open. Under the circumstances that the Carpenter testimony was submitted the trial judges properly exercised their discretion considering the lack of verity and reliability of the statements. *Kaminski* v. *Meadows,* 264 F. 2d 53 (7th Cir. 1959); *Kenosha Auto Transport Corp. v. Lowe Seed Co.,* 362 F. 2d 765 (7th Cir. 1966).

The only theory offered at the trial stage for the admissibility of the Carpenter testimony was the joint contract theory (A. I-614). The other theories offered were an afterthought raised on appeal. This joint contract theory was rejected by the trial court first because the husband was not the agent of the plaintiff, his wife, with respect to her locking her hotel room door. *Fortney* v. *Hotel Rancroft,* 511 Ill. App. 2d 327, at 333 (1955). Secondly, it was rejected because this arrangement was inconsistent with and contrary to the position of the defendant that there was no contract between the husband and wife and the hotel. Moreover, this contract was alleged in Count II of the plaintiff's Complaint and dismissed from the case on motion of the defendant (A. II-3).

In addition, the making of such statements is generally not within the scope of the authority of agents. *Hodgersen* v. *St. Louis & St. Paul R. R. Co.,* 160 Ill. 430 (1896) and *Baier* v. *Selke,* 211 Ill. 512 (1904).

The petition fails to apprise the court of the undisputed testimony of Donna Kiefel that on the way back to her hotel room from the Casino she was followed by a strange man which caused her fear (A. II-220-222). This intervening fact was unknown to her husband, Carl Kiefel, who was in the Casino. Not only is it illogical for a woman to leave her hotel room unlocked but it is all the more illogical for a woman so to do who has been followed to her room by a strange man whom she fears (A. II-221).

Finally, if the defendant's offer of proof as to the Carpenter testimony was indicative of a plan, it would be fundamental that the evidence show some connection of the plaintiff to the plan, that is, her agreement to leave the door open, her acquiescence or knowledge of such a plan (A. II-604). The difficulty with this kind of hearsay evidence is clearly described in Cleary, *Handbook of Illinois*

Evidence, 2d Ed., Sec. 17.27, "Spontaneous Declarations: Intent As Proof of Doing Act Intended." The author states:

> "The argument for admissibility is that persons who intend to do an act are more likely to do the act than are persons without the intent, and therefore the evidence of intent is relevant. At this point, however, some logical difficulty arises. The declaration of intent as evidence is subject to two weaknesses: (1) the trustworthiness of the declarant; and (2) the possibility of change of mind or supervening events to defeat the plan."

The facts contained in the voluminous police investigation file which both parties obtained in the discovery proceedings contained no statement from the long interrogation of the husband of any plan of his or his wife's for her to leave the door unlocked. Scientific evidence of the police shows clear marks of a forced entry with fresh paint chips on the floor by the door. Although the defendant had Art Tettinger, a Las Vegas locksmith, examine the door and lock on the morning of the occurrence at the time the police were there and had him listed on the pre-trial order, they saw fit not to produce him at either trial and produced no evidence contrary to the police investigation concerning the forced entry (A. II-303-304; Addl. A. 148). Failure to produce evidence within one's control raises a presumption that it would be unfavorable. Cleary, *Handbook of Illinois Evidence,* 2d Ed., Sec. 4.16, p. 66; Gard, *Illinois Evidence Manual,* Rule 22, p. 40; *Central Waxed Paper* v. *Industrial Commission,* 32 Ill. 2d 154 (1965).

Page 38 of the petition states that Mr. Kiefel did not accompany his wife to the hospital although she was critically injured. This statement is contrary to the record which shows that he did in fact render assistance to his wife and went in the ambulance with her to the emergency room of the hospital (A. I-226). Because of normal hos-

pital regulations in the case of all persons near death, the hospital did not allow him in the emergency room.

It is clear from an examination of the record that the trial courts properly exercised their discretion in excluding this hearsay testimony.

Plaintiff was injured on March 1, 1962, over seven years ago. She, and her attorneys, have been forced to engage in extensive unnecessary litigation far beyond that normally experienced in the trial of a case as a result of the professional misconduct of the defendant's counsel, Reese Hubbard. Expenditures far and above those awarded in this case as costs have been incurred by the plaintiff. There has been extensive pre-trial discovery, countless hearings in court on preliminary motions and related matters, two lengthy jury trials, an abortive appeal to the Court of Appeals, a lengthy final appeal to the Court of Appeals, and finally, the petition for certiorari to this Court. Much unnecessary effort has been expended because of the professional misconduct of the defense counsel in this case. The time has now come for litigation to end and for the plaintiff to receive her damages as a result of her injury.

The petition for writ of certiorari as to the defendant, Las Vegas Hacienda, Inc., should be denied.

REASONS FOR NOT GRANTING THE WRIT.

(AS TO HUBBARD, THE LAWYER.)

The Court of Appeals was on solid grounds when it affirmed, with slight modification, the award of costs against Reese Hubbard. The acts of defense attorney Reese Hubbard were not minor infractions. They were serious and studied acts of misconduct calculated to interfere with the plaintiff's right to a fair trial in a civil case and to disrupt the orderly processes of justice. The Court of Appeals' opinion correctly stated (A. 30):

> "The unprofessional conduct in these two trials and in the history of Hubbard's practice as shown by prior appellate opinions is outrageous in nature."

The first trial which lasted approximately three weeks went for naught because of the defendant's attorney's professional misconduct. The plaintiff was left with expenditures for transcripts, expert witness fees, plus her attorney's time. Without an award to the plaintiff for some of these first trial out-of-pocket expenditures, the award of a new trial alone, because of the professional misconduct, is wholly inadequate to restore the plaintiff to her starting position.

The economic realities in personal injury litigation such as found in the case at bar must be considered by the court in analyzing the court's power to insure and guarantee a fair trial in a civil case where the defendant blatantly engages in professional misconduct for an obvious purpose. The defense attorney's purpose is to pulverize plaintiffs into oblivion by incurring large but unnecessary costs and expenses. The award of a new trial without any recompense to the plaintiff for the costs and expenses actually aids the defense and softens up the plaintiff for the ultimate "kill." The insurance defense lawyer such as the petition-

er herein is paid on an hourly and per diem basis. New trials and re-trials do not diminish his claim to fees and actually increase his total income. Professional misconduct is monetarily rewarding to him. At the same time plaintiffs who traditionally employ attorneys on a contingent fee basis are in a worse position after a grant of a new trial because of the costs involved and the useless and uncompensated expenditure of the time and effort of the plaintiff's attorney. Moreover, they are leery of a second trial and less able to afford one. Only by making the plaintiff whole again (by an award of costs and attorneys' fees) will the plaintiff be restored to the same starting position. Obviously, this is one of the purposes of 28 U. S. C., Sec. 1927.

ATTORNEY'S FEES AND COSTS.

The authority of a court to award costs and attorneys' fees against an attorney engaging in professional misconduct is fundamental and based on both inherent and explicit powers. It is the only realistic method of insuring a fair trial. In American law in civil litigation there is no power to award attorney's fees under ordinary circumstances. Certain exceptions to this rule exist which are germane to the case at hand. Attorneys' fees may be awarded where there is a statute governing the award or where there is a fund existing for the award or under historical equitable considerations. *Vaughn* v. *Atkinson*, 369 U. S. 527, 8 L. Ed. 2d 88, 82 S. Ct. 997 (1962). These several exceptions exist where there is no professional misconduct engaged in by the opposing party. The relevant exceptions here deal with misconduct. It has long been held that a Federal Court may award fees and costs to a successful party where a defense has been maintained in bad faith, vexatiously, wantonly or for oppressive reasons. 6 Moore's Federal Practice, Sec. 54.77, p. 1352, 1966 Ed.; Annotation:

Right to Counsel's Fees in Federal Court, Sec. 9, Fraudulent, Groundless, Oppressive or Vexatious Conduct." 8 L. Ed. 2d 849, 912-913 (1963); 20 Am. Jur. 2d Costs, Sec. 74. In *Fleischman Distilling Corp.* v. *Maier Brewing*, 386 U. S. 714, 18 L. Ed. 475, 87 S. Ct. 1404 (1967) this court recognized the existence of such exceptions authorizing the award of attorney's fees by stating:

> "Limited exceptions to the American rule have, of course, been developed. They have been sanctioned by this Court when overriding considerations of justice seemed to compel such a result."

This inherent power was recognized in *Universal Oil Products Co.* v. *Roof Ref. Co.* (1946), 328 U. S. 575, 90 L. Ed. 1447, 66 S. Ct., 1176 (1946) where the court stated (dictum) at 580:

> "No doubt if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could be justly assessed against the guilty parties. Such is precisely a situation where 'for dominating reasons of justice' a court may assess attorneys' fees as part of the taxable costs."

In *Local No. 49 United Auto Workers* v. *American Brake Shoe Co.*, 298 F. 2d 212 (4th Cir. 1962) the court stated the principle at 214:

> "The principle that the Federal Courts have inherent power to award attorneys' fees as costs in the absence of statutory authority has been recognized where such fees have been denied, relied on where they were granted. The variety of factual circumstances in which this principle has been applied indicates that 'dominating reasons of justice' has been the guide to its application."

See also *Cleveland* v. *2nd National Bank* (6th Cir., 1945), 149 F. 2d 466, cer. denied, 326 U. S. 775, 90 L. Ed. 466, 66

S. Ct. 231 (Court held it had inherent power to award attorneys' fees in extraordinary case under theory of historical equitable powers of court).

In *Bell* v. *School Board of Powhatan County* (4th Cir., Va., 1963), 321 Fed. 2d 494, 500, the prevailing party was held entitled to counsel fees in a school integration suit. The court took into account the defendants' "long continued pattern of evasion and obstruction which included not only the defendants' unyielding refusal to take any initiative thus casting a heavy burden on the children and their parents, but their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiffs for a desegregated education."

In the last term of this court by per curiam decision the court's inherent power to award attorneys' fees in the face of the defendant's bad faith conduct was again underscored. In *Newman* v. *Piggie Park Enterprises,* 390 U. S. 400, 19 L. Ed. 2d 1263, 88 S. Ct. 946 (1968) it was pointed out that attorneys' fees under the Civil Rights Act of 1964 are authorized by statute and even if the statute did not so provide would be allowed if the defendants had been guilty of oppressive or bad faith conduct and in so noting stated in Footnote # 4:

> "If Congress' objective had been to authorize the assessment of attorneys' fees against defendants who make completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'' 6 Moore's Federal Practice, 1352 (1966 ed.)."

No court system can operate without provision for reimbursement to an aggrieved party for attorneys' fees and expenses needlessly incurred where the other party has

engaged in bad faith in the pre-trial and trial stages of litigation. The Federal Rules of Civil Procedure explicitly recognize this reality. Rule 37 provides in the case of refusal to make discovery that the court may require

> "the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorneys' fees."

Rule 56 in connection with summary judgments provides that where an offending party makes affidavits in bad faith the court may order the offending party

> "to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorneys' fees, * * *"

Even where there has been no bad faith or misconduct this court has sanctioned local civil rules for the district courts (*e.g.*, Civil Rule 4 of the U. S. District Court for the Northern District of Illinois) which provide for the payment of attorneys' fees and expenses in connection with depositions taken more than 150 miles from the courthouse. The obvious purpose of the latter cited rule and also the bad faith rule is to make whole a party whose opponent is not operating in good faith or who is in a position to assert superior economic power to prevent a fair trial.

Attorney Reese Hubbard cannot honestly claim that he is unaware of the ethical fairness standards imposed upon a trial lawyer. The case law for which he has been largely personally responsible speaks for itself. In addition, two other members of his law firm have recently had new trials awarded to a plaintiff because of their trial misconduct. *Svoboda* v. *Blevins*, 76 Ill. App. 2d 277, 279-280 (1967); *Schoolfield* v. *Witkowski*, 54 Ill. App. 2d 111, 125, 126, 129 (1964).

The petitioners claim (pp. 31-33) that the Court of Appeals had no authority to assess one-third of all attorneys'

fees in the three lengthy appeals against Attorney Reese Hubbard. Courts of appeals have recognized in numerous cases their power to award both attorneys' fees and costs in cases of frivolous appeals or in the face of reprehensible conduct. In addition to 28 U. S. C., Sec. 1912 and 1927, Rule 38 of the newly enacted Federal Rules of Appellate Procedure specifically provides that a court of appeals may award just damages and double costs to the appellee where the appeal taken is "frivolous." The case law where courts of appeal have awarded attorneys' fees and costs are directly applicable here. In *Jones* v. *Schellenberger,* 225 F. 2d 784, 794-795 (7th Cir., 1955), the defendant prevailed on appeal but because his reprehensible conduct prolonged the litigation and increased the costs, all costs and attorneys' fees were taxed against him. *In re Midland United Co.,* 141 F. 2d 692 (3rd Cir., 1944), $1,000 attorney's fees plus all costs were taxed because of such conduct. In *Lowe* v. *Willacy,* 239 F. 2d 179 (9th Cir., 1956), the court in awarding attorney's fees and costs for the frivolous appeal said (p. 180):

> "Since appellant by her own act has forced appellee to consider her brief and thereby necessarily to write his opposing brief, in affirming we adjudge to appellee just damages for his delay, 28 U. S. C. 1912, of double his costs and an amount equal to the fee paid his attorney for his services in the appeal and the amount paid for the printing of his brief . . ."

Dunscompe v. *Sayle,* 340 F. 2d 311 (5th Cir., 1965), cer. den. 382 U. S. 814, 86 S. Ct. 30, 15 L. Ed. 2d 62 (1965) (double costs were awarded). In *Ginsburg* v. *Stern,* 295 F. 2d 698 (3rd Cir., 1961), $500 attorney's fees plus costs were awarded. In *Griffin Wellpoint Corp.* v. *Munro-Langstroth, Inc.,* 269 F. 2d 64 (1st Cir., 1959), an award of double costs was made because of the frivolous and vexatious appeal and tricks (citation misquotes) engaged in by the opposing side in their brief.

In *Weiss* v. *U. S.*, 227 F. 2d 72 (2d Cir., 1955), costs against the offending attorney were suggested, cer. den., 76 S. Ct. 308, 350 U. S. 936, 100 L. Ed. 817 (1956). In *Southern Railway* v. *Gadd*, 233 U. S. 572 (1914), 58 L. Ed. 1099, 34 S. Ct. 696, a personal injury case, this court found that the defendant was guilty of filing a frivolous appeal for the purpose of delay and assessed as a penalty 5% of the amount of the judgment. *Deming* v. *Carlisle Packing Co.* (1912), 226 U. S. 102, 110, 33 S. Ct. 80, 57 L. Ed. 140 (costs plus 5% of judgment awarded).

The Court of Appeals was fully justified in assessing one-third of the appeal attorney's fees against Reese Hubbard based on the record before it. The court had new matters before it in addition to the misconduct that occurred in the first trial and was the subject of the Judge Robson order awarding fees and costs. This new matter consisted of the trial tactics of the defense lawyer in the second trial before Judge Decker, including his attempt to slip an unadmitted exhibit into the jury room concerning which all briefs devoted considerable space. Moreover, the court had before it the action of Reese Hubbard in filing an abortive and untimely notice of appeal from the new trial order some six months after the new trial order had been entered. This abortive notice was filed on the eve of the second trial and cast a cloud on the whole proceeding so that appellee was forced to incur the cost and attorneys' fees in preparing a Short Record on Appeal and filing a motion and brief in support thereof for the dismissal of this unwarranted appeal. It was clear that Reese Hubbard engaged in this action to further economically pulverize the injured plaintiff by the further incurring of unwarranted costs. Based on the foregoing record, the Court of Appeals was fully warranted in awarding the attorneys' fees, both within its inherent powers and within its powers under the applicable statutes and rules.

NO CRIMINAL CONTEMPT SOUGHT.

Petitioner premises his major attack on the award of attorneys' fees and costs for his misconduct on an analogy to the criminal contempt statute and the cases arising thereunder. The award against him for attorneys' fees and costs was not made under any civil or criminal contempt statute or proceeding. Thus, his cited authorities in connection therewith have no application here. 18 U. S. C., Sec. 401 pertains only to criminal contempt where criminal sanctions, such as imprisonment, are requested. Civil contempt, being only compensatory in nature, is not covered by this statute but is bottomed on the inherent powers of the court. *Odell* v. *Bausch & Lomb,* 91 F. 2d 359, 361 (7th Cir., 1937). The award in the case at bar was neither criminal nor civil contempt, involved no fine and no stigma of contempt. It was purely remedial since its purpose was to make the plaintiff whole again for costs needlessly and futilely expended as a result of the misconduct of Attorney Reese Hubbard.

Significantly, the federal corts in civil contempt cases have consistently held that it is proper to assess attorneys' fees and costs as a compensatory remedy to restore the injured party to his former position. The civil contempt power to award a compensatory attorney's fees is also based on the inherent judicial powers of the court. There can be no doubt that Reese Hubbard's conduct could have formed a basis for civil contempt if such had been sought. Numerous federal courts have imposed attorneys' fees and costs in civil contempts and in other cases, in the exercise of their discretion, have not imposed such remedial remedy where the facts did not warrant it but at all times have recognized their authority to so do in appropriate circumstances. In *In re Federal Facilities Realty Trust* v. *Kulp,* 227 F. 2d 657 (7th Cir., 1955) the court, in a civil contempt

proceeding, denied the award of attorneys' fees and costs to the facts involved but recognized the power to do so stating:

> ". . . All authorities seem to agree that the assessment of expenses and attorney's fees incurred in a civil contempt case against a contemnor is discretionary. The rule to be spelled out from the court decisions is that a party compelled to resort to a civil contempt proceeding to preserve and enforce an adjudicated right is entitled to a decree by way of a fine for injuries actually sustained by him because of the contemptuous act, *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U. S. 448, 52 S. Ct. 238, 76 L. ed. 389; *Worden* v. *Searls*, 121 U. S. 14, 26, 7 Ct. 814, 30 L. ed. 853; *Nortsrom* v. *Wahl*, 7 Cir. 41 F. 2d 910; *Rivers* v. *Miller*, 5 Cir., 112 F. 2d 439, 443; *cf. Brooks* v. *United States*, 9 Cir. 119 F. 2d 636, 646-647; 17 C. J. S. Contempt, Secs. 96, 127; 12 Am. Jur. Contempt sec. 79, which may include, in the discretion of the court, an award of reasonable attorney's fees. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 426-428, 43 S. Ct. 458, 67 L. ed. 719 affirming, 7 Cir., 281 F. 488."

See Annotation 55 ALR 2d 979, "Allowance of Attorneys' Fees in Contempt Proceedings"; *Toledo Scale* v. *Computing Scale Co.*, 261 U. S. 399, 67 L. Ed. 719, affirming 281 F. 488 (7th Cir. 1923) (An award of reasonable attorneys' fees may in the discretion of the court be awarded in civil contempt); *Nelson* v. *Steiner*, 279 F. 2d 944 (CA-7, 1960); *Crane* v. *Gas Screw Happy Pappy*, 367 F. 2d 771 (CA-7, 1966) (The Court approved an award of $2,500 in attorneys' fees, expenses and damages, and also additional attorneys' fees and costs in the appeal); *Lance* v. *Plummer*, 353 F. 2d 585, 592 (CA-5, 1965) (Allowance of attorneys' fees and costs to injured party in civil contempt under the Civil Rights Act of 1964 was clearly compensatory and not improper as being punitive).

In the case of *McComb* v. *Jacksonville Papers Co.*, 336

U. S. 187 (1948) the defendant had violated the Fair Labor Standards Act minimum wage order previously entered. The trial court summarily held the defendant in civil contempt for refusal to pay the minimum wages and ordered the defendant to pay the money damages directly to the employees injured. This court upheld this use of the civil contempt penalty which was remedial in nature and required the violator to pay the damages directly to the persons harmed.

CONFRONTATION AND HEARING.

The petitioner's charge that he was denied the right of confrontation and cross-examination and evidentiary hearing in connection with the motion to assess costs and attorneys' fees is wholly without merit. The record is replete with the extended hearings, briefs, and answers filed by the defendant to these charges. Four of the charges of misconduct were contained in the plaintiff's post-trial motion before Judge Robson (A-I-26-31). To this the defendant filed two long answering memoranda, one of which is in the Appendix (A-I-42). In addition, the court held an extensive hearing at which Mr. Hubbard had an opportunity to explain his justification of his conduct (Addl' A-94-112).

The motion for taxing of attorneys' fees and costs realleged the four acts of misconduct occurring in the first trial and contained in the motion for new trial plus six additional acts of misconduct (A-I-47). On September 18, 1966, Mr. Hubbard filed a 65-page answer to this motion (A-I-84-138), plus a 13-page memorandum of authorities. Previously in his affidavit of bias he also answered (A-I-67-78). In addition, defendant filed a specification of jury demand in late September of 1966. In early October 1966 both defendants filed a further specification of jury de-

mand. The defendant offered no evidence and made no further requests to furnish additional evidence at the ruling on the motion (A-I-623, 630-632) or at the hearing on the prove up (A-I-633-662). Indeed, when one examines the acts of misconduct, they are all items which occurred in the presence of Judge Robson and during which the court heard explanations at the time outside the presence of the jury by Mr. Hubbard when he was called to answer and explain his conduct as it occurred.

It is clear that Mr. Hubbard has taken advantage of a full opportunity to explain and did present his explanation to the court on numerous occasions. Moreover, we point out to this Court that in connection with the taxation of costs and attorneys' fees under the discovery provisions of the Federal Rules these are done summarily. In Illinois, in connection with the assessment of costs and attorneys' fees against a person who makes untrue statements in pleadings, it is provided in Section 41 of the Civil Practice Act (Ill. Rev. Stat., Chap. 110, Sec. 41) that the court may "summarily" tax costs and attorneys' fees. Judge Robson did not summarily tax costs and attorneys' fees but did this after due deliberation and after the numerous hearings given to the defendant to justify his conduct.

Petitioner charges throughout his petition that he was improperly charged and found guilty of interfering with the release of the court reporter so as to prevent her appearance at trial. He charges this was based on mere speculation. Petitioner seeks to mislead the court with reference to the central issues in connection with the misappropriation and not filing of the deposition. We have clearly shown his conduct in connection with the false statements, the suppression and interference with the filing of this deposition. In addition, but not necessary for a finding in connection with the deposition suppression, was the showing of plaintiff's attorney Jacobson efforts to obtain

the court reporter to prove the deposition testimony that was wrongfully withheld. To effectively stymie the plaintiff in attempts at both methods of obtaining the impeachment tools, underscores the misconduct of secreting the deposition in the first place. We again note that the petition cites no evidence in conflict with the charge and finding that he lied to the judge about the deposition's whereabouts, his knowledge of witness' inked-in changes in the deposition and false statements as to when he mailed the deposition back to the court reporter. This basic finding is unrebutted because Hubbard had been caught in the falsehood. His only defense is to divert the court's attention from the central issue to a collateral one.

Petitioner complains that under Rule 52 of the F. R. C. P. specific findings of fact and law are required. The contrary is the case. In Rule 52(a) the last sentence specifically provides that such findings of fact and conclusions of law are unnecessary in connection with motions. Moreover, the court's written opinion is very specific on both these issues.

JURY TRIAL ISSUE.

The petitioner is not entitled to a jury trial in connection with the motion to tax attorneys' fees and costs. Petitioner's brief (p. 27) makes this charge but cites no case law in support thereof. The recent decisions concerning civil and criminal contempt powers of the court clearly circumscribe the fact there is no jury trial in connection with a motion to assess costs. In criminal contempt proceedings where the respondent may be sentenced to jail this Court has held that the respondent is entitled to a jury trial only if the sentence to be imposed is more than six months in jail, and if less than six months, then there is no right to a jury trial. *Cheff* v. *Schnackenberg,* 341 F. 2d 548 (CA-7, 1965), affd. 384 U. S. 373, 16 L. Ed. 2d 629,

86 S. Ct. 1523 (1966); *U. S.* v. *Barnett* (Governor of Mississippi), 376 U. S. 681, 12 L. Ed. 2d 23, 84 S. Ct. 984 (1964); *Bloom* v. *Illinois,* 391 U. S. 194, 20 L. Ed. 2d 522, 88 S. Ct. 1477 (1968). These decisions point out that there is absolutely no right to a jury trial under any circumstances in a civil contempt citation where the remedy is remedial or compensatory and not punitive as in a criminal contempt. *Odell* v. *Bausch & Lomb,* 91 F. 2d 359, 361 (CA-7, 1937) directly held there is no jury trial right in civil contempt. Judge Robson cited in the case at bar additional cases holding there is no jury trial on an assessment of costs and attorneys' fees (A-I-627). *Empire State Ins. Co.* v. *Chafetz,* 302 F. 2d 828 (CA-5, 1962); *Spach* v. *Monarch Ins. Co.,* 309 F. 2d 949 (CA-5, 1962); *Swofford* v. *B. & W. Incorp.,* 336 F. 2d 406 (CA-5, 1964).

EXPERT WITNESS FEES.

The award of the $675 for expert witness fees dealt with the fees paid to the doctors to testify in the first trial and to the lock expert whose testimony went for naught as a result of the professional misconduct of Mr. Hubbard. In order to make the plaintiff whole and put her in the same position she would have been in had not the professional misconduct of the defense attorney prevented a fair trial, the court awarded to her those costs that were uselessly expended in the first trial and would have to be repeated in the second trial. In the extraordinary circumstances herein found there is authority that such costs be awarded.

Even in the ordinary case not involving misconduct or "exceptional circumstances" the court in its discretion may award expert witness fees not provided for by statute. This exercise of discretion will not be upset unless abused. In the case which petitioners cite on page 34 of the pe-

tition, *Euler* v. *Walker* 295 F. 2d 765 (CA-10, 1961) it was stated:

> "For compelling reasons of justice in exceptional cases allowances may be made of items of cost not authorized by the statutes."

Moreover, Justice Black stated in *Farmer* v. *Arabian American Oil Co.*, 379 U. S. 227 at 235:

> "The discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute."

Other courts have stated that in appropriate cases they have the power to tax expert witness fees. *Department of Highways* v. *McWilliams Dredging Co.*, 10 FRD 107, 109 (D. C. La., 1951); *Banks* v. *Chicago Mill and Lumber Co.*, 106 F. Supp. 234, 236 (D. C. E. D. Ark., 1950).

CONCLUSION.

For the foregoing reasons, it is respectfully prayed that each petition for a writ of certiorari as to (a) the $100,000 personal injury award against Las Vegas Hacienda, Inc., and (b) Attorney Reese Hubbard for costs and one-third appeal attorneys' fees, be denied.

Respectfully submitted,

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APPENDIX A.

STATUTES AND RULES.

1. Federal Rules of Civil Procedure.

Rule 37. *Refusal to Make Discovery: Consequences*

(a) Refusal to Answer. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in

opposing the motion, including reasonable attorney's fees.

Rule 52. *Findings by the Court.*

(a) *Effect.* In all actions etc., tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

Rule 56. *Summary Judgment.*

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and

any offending party or attorney may be adjudged guilty of contempt.

2. Federal Rules of Appellate Procedure.

Rule 38. *Damages for Delay.*

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

3. United States Code.

Title 28, U. S. C., Sec. 2111. *Harmless error.*

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. Added May 24, 1949, c. 139, sec. 110, 63 Stat. 105.

4. Illinois Civil Practice Act.

Section 41. Illinois Revised Statutes, Chap. 110. *Untrue statements.*

Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial.